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In the Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-1153

KEM MANUFACTURING COMPANY, INC.,

Petitioner,

versus

DRACKETT PRODUCTS COMPANY, et al,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Drackett Products Company, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari seeking review of the United States Court of Appeals for the Fifth Circuit's opinion in this case. That opinion is reported at 598 F.2d 402 (5th Cir., 1979), denial of application for rehearing, 604 F.2d 320 (5th Cir., 1979).[1]

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1. There is no District Court opinion.

QUESTIONS PRESENTED

Whether the answers by the jury to questions submitted to it in accordance with Rule 49(a) of the Federal Rules of Civil Procedure reflect inconsistent fact finding so as to require a new trial on Respondents's cross-claim for contribution?

STATUTORY PROVISION INVOLVED

Rule 49(a) of the Federal Rules of Civil Procedure provides:

Rule 49.

SPECIAL VERDICTS AND INTERROGATORIES

(a) Special Verdicts. The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The Court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the Court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the Court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

STATEMENT OF THE CASE

The statement of the facts of this case by the Court of Appeals [2] was correct and complete save for mention of the trial judge's instructions to the jury with regard to certain of the Interrogatories.

First, the trial judge's instructions to the jury with regard to Interrogatory No. 1 erroneously dictated the jury's answer to Interrogatory No. 1 that Petitioner, Kem, had not negligently failed to warn plaintiff. The jury's answer to Interrogatory No. 1 was given after the trial judge instructed the jury as follows:

> Now, even if you find that the Defendant or either one of them failed to properly label their product that is not sufficient in itself for you to find for the plaintiff. To hold either Kem or Drackett liable for failure to warn it must be shown that its failure to give notice or warn was a cause of the accident. Thus, if you find that even if the manufacturer had given notice and warning, the accident would have still occured, you must return a verdict in favor of these manufacturers and you may not find for Plaintiff or (sic) this cause of action. Insofar as the manufacturer of the product Thermakem is concerned, I direct your attention to the fact that Plaintiff had read the label and knew it should not be mixed with any other chemical compound or Drano. Therefore, *if you find that the accident was caused by mixing Thermaken with Drano or some other chemical compound you may not find the Defendant Kem Manufacturing, Inc. liable for damages on the claim against it for failure to properly label its product.*[3]

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2. 598 F.2d at 404-405.

3. Fifth Circuit Appendix, p. 840. (Emphasis Added).

Respondent Drackett objected to this instruction because of the failure of the Thermakem label to warn that the "presence" of another chemical with which Thermakem should not be mixed could still exist even when such other chemical had been used several days before the use of Thermakem.

The importance of this omission is demonstrated by the following testimony given by the plaintiff, Michael J. Guidry:

> Q. Now, Michael, let's return to the date of the accident, that Monday morning, March 6, 1972. Had anyone told you that any other drain cleaner had been put into the kitchen sink before you attempted to unplug it with the Thermakem?
>
> A. No, sir.
>
> Q. If anyone had told you, Michael, that some other chemical product, such as Drano, had been put into that kitchen sink would you have used that Thermakem that morning?
>
> A. I would have not used anything else in the sink *if I knew anything else was put in,* I would not have used the Kem or I would not have used anything.[4]

The critical fact in this testimony is that plaintiff would not have used the Thermakem if he knew that "anything else", and, more particularily, the residue of Drano used two days before was still in the drain. Unlike persons having a scientific or technical training, and unlike the manufacturer of Thermakem, plaintiff would and did not realize that Drano which had been placed in the drain several days to a week before could still be "present", nor could he see in the drain so

4. Fifth Circuit Appendix, pp. 383-384. (Emphasis Added).

as to be able to ascertain the presence of any Drano residue. Consequently, a warning that he should not use Thermakem if any other chemical was "present" in the drain fell considerably short of adequately warning him of the hazard to which he was exposed in using this product. Having instructed the jury in this fashion, the trial judge's inclusion of Interrogatory No. 1 in the jury interrogatories was the sheerest supererogation and the jury could only return a negative answer unless it chose to disregard his instruction.

Second, Respondent's third-party demand was asserted not only against Petitioner, but also against other third-party defendants. This is reflected in the Court's addressing three separate interrogatories to the jury with respect to the third-party demand. These interrogatories were:

> 6. Were third-party defendants Reverand Gerald J. Baudouin, The Catholic Society of Religious and Literary Education, Jesuit High School, or the Archdiocese of New Orleans actively negligent in a manner which was a proximate cause of injury to plaintiff?
>
> 7. Was third-party defendant Kem Manufacturing Company actively negligent in a manner which was a proximate cause of injury to plaintiff?
>
> 8. Were third-party plaintiffs Drackett actively negligent in a manner which was a proximate cause of injury to plaintiff?

These interrogatories were explained by the trial Judge in his charge as follows:

Drackett claims that in the event that Drackett is found to be liable to Mr. Guidry, which Drackett has denied, then the defendants in Dracketts claim are liable to Drackett to reimburse or indemnify in the amount that Drackett must pay to Mr. Guidry.

According to the law, such an action or claim is only available to one who is only passively, vicariously, or secondarily at fault as against a party whose active or primary negligence causes the injury or damage upon which recovery is predicated.

. . . . . .

The burden is on Drackett in its claim against Kem and the Jesuits to prove that the negligence or fault on the part of Drackett in causing injury to Mr. Guidry was merely passive, vicarious or technical and that the negligence of Kem and the Jesuits or any of them was active negligence as I have explained that term to you. In the event that you find that Drackett was only passively or technically negligent in causing Mr. Guidry's injury, then Drackett is entitled to recover on its claim. However, in the event that you find that Kem and the Jesuits were not actively negligent or that Drackett was also actively negligent in causing injury to Mr. Guidry, then Drackett can not prevail on its claim against Kem and the Jesuits. [5]

After receiving this charge, the jury answered the interrogatories concluding that both Kem and Drackett were "actively negligent in a manner which was a proximate cause of injury to plaintiff", but that the remaining third-party defendants were not "actively negligent in a manner which was a

5. Fifth Circuit Appendix, pp. 845-847. (Emphasis added).

proximate cause of injury to plaintiff". Had the jury only intended to deny indemnity to Respondent by answering in this way, as Petitioner argues, it seems a little strange the jury did not conclude that all third-party defendants were "actively negligent in a manner which was a proximate cause of injury to plaintiff" or, alternatively, that only Drackett was "actively negligent". As seen from the Judge's instructions, the jury was not told that it must find Drackett and Kem "actively negligent" in order to deny Drackett's claim for indemnity. The question of indemnity was disposed of by a finding that Respondent Drackett was "actively negligent in a manner which was a proximate cause of injury to plaintiff". A finding that Kem was also "actively negligent" went beyond this and was instead an independent finding that Kem was negligent.

REASONS WHY THE WRIT SHOULD BE DENIED

The United States Court of Appeals for the Fifth Circuit, in a well reasoned opinion by Judge Alvin B. Rubin, adequately and correctly disposed of Petitioner's arguments in the Petition for Writ of Certiorari. Each and every argument raised by Petitioner was raised in the Court of Appeals and the decision below gave full consideration to these issues and decided them correctly. The issue presented by the application for a Writ of Certiorari is a narrow one, limited to the facts of this particular case, and of no general importance as a precedent or otherwise. Neither legal nor practical considerations warrant review by this Court on certiorari.

The holding of the Court of Appeals of which Petitioner seeks review is that the jury's answer to questions addressed to it in accordance with FRCP Rule 49(a) reflect inconsistent fact findings, necessitating reversal of the District Court's judgment if favor of Petitioner on Respondent's claim for contribution and remand for a new trial on that issue. The Court's holding is confined to the facts of this particular case and to the particular questions which elicited the particular inconsistent fact findings; no principle of general application is involved.

The issue of Respondent's entitlement to contribution was indisputably before the Court, having been asserted by cross-claim and having never been abandoned. As is pointed out by the Court of Appeals, under Louisiana law the issue of contribution between joint tort feasors is one of law [6] and Respondent's focusing throughout the trial on its cross-claim for indemnity (to which its cross-claim for contribution was alternative) did not remove it from the case. Petitioner does not dispute that the Court of Appeals "succinctly and correctly set forth" Louisiana's law and jurisprudence concerning contribution. [7]

The factual basis for resolving the legal issue of Respondent's right to contribution was a finding by the jury of negligence on Petitioner's part. Two questions as to Petitioner's negligence were addressed to the jury, viz.

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6. 594 F.2d at 407.

7. Petition, p. 10.

1. Was the product supplied by defendant Kem Manufacturing Company (Kem) defective, or did defendant Kem breach its implied warranty or negligently fail to warn plaintiff, in a manner which was a proximate cause of injury to plaintiff, Mr. Guidry?

7. Was third-party defendant Kem Manufacturing Company actively negligent in a manner which was a proximate cause of injury to plaintiff?

The jury's negative answer to the first of these two questions and affirmative answer to the second were correctly held by the Court of Appeals to be inconsistent.

Petitioner's contention that the jury's answer to Interrogatory No. 7 msut be limited to the issue of indemnity because it was instructed only as to indemnity, and not as to contribution, [8] ignores the dichotomy in the law of Louisiana that the right to contribution is a question of law, but determination of the facts to which this law applies is one of fact. Unlike indemnity, the criteria of "active" and "passive" fault are immaterial to the issue of contribution and the fact that the jury was not instructed as to what effect a finding of "active" fault on the part of both defendants would have in a contribution context is irrelevant to its finding that Petitioner was "actively negligent in a manner which was a proximate cause of injury to plaintiff". If the jury had only attempted to deny indemnity by finding Petitioner Kem "actively negligent" as Petitioner argues, why is it that the remaining third-party defendants were found not "actively negligent" which finding also denied indemnity?

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8. Ibid.

There is hopeless inconsistency between a negative answer to the question whether Respondent breached its implied warranty or negligently failed to warn plaintiff on the one hand and an affirmative answer to the question whether Petitioner was "actively negligent in a manner which was a proximate cause of injury to plaintiff" on the other. One cannot be both actively negligent and not negligent; active negligence is a special form of negligence. When the jury responded that Petitioner was actively negligent in a manner which was a proximate cause of injury to plaintiff, irrespective of whether this response was related to Respondent's claim for indemnity or otherwise, it indisputably made a finding of negligence which suffices for contribution. Respondent's claim for indemnity was disposed of by the jury finding that Drackett "was actively negligent in a manner which was a proximate cause of injury to plaintiff".

For the same reasons, it cannot be successfully argued that the issue of negligence was omitted so as to permit the trial judge to make a finding thereon as provided by Rule 49 (a). As the Court of Appeals correctly points out, "the fact question - was Kem negligent- was not omitted. It was put, at least implicitly, not once, but twice. Therefore, the fact issue could not be resolved by the trial judge, and, of course, the legal issue (of contribution) could not be decided without the indispensible finding of fact." [9]

It was not the jury's function to decide the legal question whether Respondent was entitled to indemnity or to con-

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9. 604 F.2d at 321.

tribution; its function was to determine the facts upon which the court would make the legal determination of these issues and, when it did so in an inconsistent manner, reversal and remand became inevitable. "In the end, fact questions essential to decision of the legal question of contribution were submitted and were answered inconsistently." [10]

The petition for a writ of certiorari should be denied because, first, the decision below is clearly correct, second, there is no conflict of decision and, third, there is no important question of federal law.

The authorities cited by the Court of Appeals [11] stand squarely for the proposition that the issue of contribution by joint tort-feasors is one of law which is to be resolved by the Court in accordance with the factual findings. It follows that determination of the facts on which Respondent's right to contribution would be decided was for the jury. Consequently, the jury's inconsistent finding of fact as to Petitioner's negligence prevented the trial court from deciding this issue and reversal and remand became necessary.

There is no suggestion that there is a conflict between the decision of the Court of Appeals and any of the other Circuit Court of Appeals or with any decision of this Court. Consequently, there is no conflict of decision which would warrant issuance of a Writ of Certiorari. Additionally, there is no important question of Federal law involved.

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10. Ibid.

11. 598 F.2d at 407; citing, La. Civ. Code, Art. 2103; Trahan v. Highlands Inc. Co., 343 So.2d 1163, 1165-6.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari seeking review of the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully Submitted,

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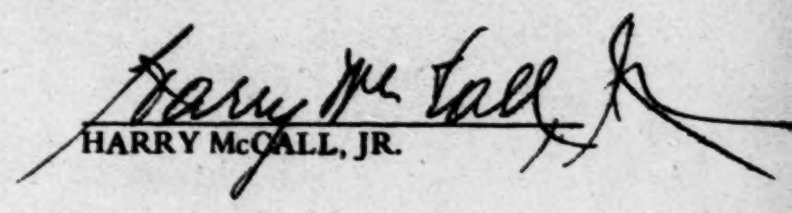
CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of February, 1980, three copies of this opposition for a Writ of Certiorari were hand delivered, to Wood Brown, III, Esq. and Daniel Lund, Esq., 806 First N.B.C. Bldg., New Orleans, Louisiana, 70112, Counsel for Petitioner. I further certify that all parties required to be served have been served.



HARRY McCALL, JR.